WAN SAGAR WAN EMBONG A

v.

HARUN TAIB & ORS

HIGH COURT MALAYA, KUALA TERENGGANU B
KANG HWEE GEE J
[ELECTION PETITION NO: 03-2008]
1 JUNE 2008

ELECTION: *Petition - Application for declaration that election void - Allegation of corrupt and illegal practices - Non-compliance - Whether petition unsustainable - Election Offences Act 1954, s. 32(a), (b), (c)* C

This was a petition by the petitioner, the losing Barisan Nasional candidate in the 12th General Election held on 8 March 2008 in respect of the State Constituency N.22 Manir Terengganu, to declare the election of the winning PAS candidate void. The petition was grounded on the complaints under provisos (a), (b) and (c) of s. 32 of the Election Offences Act 1954 ('Act') read with r. 4(1) of the Election Petition Rules 1954. The petition arose from an incident in which the respondent allegedly through his agents or representatives had attempted to obstruct voters from voting by holding up a registered voter, as a result of which the voter was unable to vote. The petitioner claimed that the respondent had directly or indirectly committed acts of undue influence under s. 9(1) of the Act, which constituted corrupt or illegal practices under s. 32(c) of the Act. The petitioner also claimed that acts of general intimidation had so extensively prevailed at the N.22 Manir State Constituency that it may be reasonably supposed to have affected the result of the election, thereby constituting a ground under s. 32(a) of the Act to declare the election of the constituency void. It fell to this court to consider whether the petitioner had pleaded the necessary facts and grounds to sustain the petition under s. 32(a), (b) and (c) of the Act. D E F G H

Held (striking out the entire petition):

(1) The petitioner would be required to state with precision such acts or instances which could be attributed to the 1st respondent to indicate his culpability and which he would have to verify at the hearing of the petition. It would not I

A be enough (as the petitioner had done in this instance) for him to merely repeat the exact words of s. 32(c) of the Act and to treat it as "facts and grounds" to satisfy the requirement that the alleged corrupt practice was "committed by the candidate or with his knowledge or consent, or by
B any agent of the candidate". A failure to state in the petition such facts to indicate the culpability of the 1st respondent meant a failure on the petitioner's part to establish a ground worthy of sustaining the petition and must be struck out. Since the petition under s. 32(a) of the Act alleging that acts
C of intimidation had so extensively prevailed that they may be reasonably supposed to have affected the result of the election was premised on the same facts and grounds as alleged under s. 32(c) of the Act, it must therefore suffer the same fate. (paras 30, 31, 32 & 33)

D

(1a) In respect of s. 32(b) of the Act, assuming that the petitioner succeeded in proving that the denial of the voter's right to vote was wrongful and could be construed as non-compliance with the written law relating to the conduct of
E an election, to sustain the petition on this ground, he would still have to "prove to the satisfaction of the election judge" that the non-compliance affected the result of the election. The petitioner's submission that the question of whether there was non-compliance of any written law relating to the
F conduct of the election was a matter of evidence to be determined at the hearing of the petition where the allegation of the voter had to be verified and the conduct or act of the officer had to be examined was acceptable. However, what could not be accepted was the petitioner's submission
G that the question of whether the non-compliance of such law had also affected the result of the election should also be determined at the hearing. It was plain that the difference of one vote would not have made any difference. Although there may be extraneous circumstances where even
H preventing one voter to cast his vote may affect the result of the election, if the petitioner had indeed intended to rely on such extraneous circumstances as a ground then it would incumbent upon him to plead facts to indicate such circumstances in his petition. This, however, was not done.
I The petition on this ground was plainly unsustainable and should be struck out. (paras 37, 38 & 39)

Case(s) referred to:

Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors [2005] 2 CLJ 237 FC ***(refd)***

Hardwari Lal v. Kanwal Singh [1972] AIR Vol 59 SC ***(refd)***

Morgan v. Simpson [1974] 3 All ER 722 ***(refd)***

Patau Rubis v. Patrick Uren & Anor [1984] 1 CLJ 51; [1984] 2 CLJ (Rep) 348 HC ***(refd)***

Re Lundie Brothers Ltd [1965] 2 All ER 692 ***(refd)***

Tan Yar Joo v. Sin Yee Estate Sdn Bhd [1995] 2 CLJ 657 HC ***(refd)***

Legislation referred to:

Election Offences Act 1954, ss. 4(d), 9(1), 32(a), (b), (c), 34

Election Petition Rules 1954, rr. 4(1)(b), 16

Elections (Conduct of Elections) Regulations 1981, r. 14

Representation of the People Act 1951 [Ind], s. 83

Representation of the People Act 1949 [UK], s. 37(1)

For the petitioner - Firoz Hussein Ahmad Jamaluddin (Shamshawal Azraai Ahmad with him); M/s Ahmad Shahabuddin & Co

For the 1st respondent - Dato' Wan Abd Muttalib (Tuan Hj Mohamad Ariff Md Yusof & Saiffuddin Othman with him); M/s Wan Abd Muttalib & Co

For the 2nd & 3rd respondents - Iznan Ishak (Khairul Fazly with him); SFCs

Reported by Suresh Nathan

JUDGMENT

Kang Hwee Gee J:

[1] This is a petition by Wan Sagar bin Wan Embong, the losing Barisan Nasional candidate in the 12th General Election held on 8 March 2008 in respect of the State Constituency N.22 Manir Terengganu to declare the election of the winning PAS candidate Harun bin Taib void.

[2] The 1st respondent Harun bin Taib from PAS, the only other candidate in the election, was declared the duly elected member of the State Legislative Assembly for the Constituency of Manir by polling 5,323 against the petitioner's 4,917 votes – a majority of 406.

[3] The petitioner claimed the right to present this petition under s. 34 of the Election Offences Act 1954 as a person who has the right to be returned or elected at the election under proviso (b) of the section.

[4] The petition is grounded on the complaints under proviso (a), (b) and (c) of s. 32 of the Election Offences Act 1954, read with r. 4(1) of the Election Petition Rules 1954.

[5] Section 32(a), (b) and (c) of the Act reads as follows:

> The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:
>
> (a) that general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;
>
> (b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;
>
> (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;

[6] Rule 4(1) of the Election Petition Rules 1954 reads as follows:

> An election petition shall contain the following statements:
>
> (a) it shall state the right of the petitioner within **s. 34 of the Act**; and
>
> (b) it shall state the holding and result of the election **and shall briefly state the facts and grounds relied on to sustain the prayer.**

[7] The petition arose from two incidents which occurred on election day 8 March 2008.

The 1st Incident

[8] At about 10am at the entrance of the Sekolah Kebangsaan Teluk Menara Polling Centre, on election day 8 March 2008, the respondent through his agents or representatives consisting of ten Malay persons had attempted to obstruct voters from voting by holding up a registered voter Muhammad Amiruddin Mariappan bin Abdullah. A person from among the group who was wearing a PAS symbol whom the voter recognized as Saidi bin Samad took the voter's wallet which contained his identity card and cash of RM2,000. Another person whom the voter recognized as Faizal Ali punched the voter on his left cheek. Yet another whom he also recognized hit him. The voter was accused of being a Bangladeshi.

[9] As a result of the incident the voter was unable to vote on the voting day and a report of the incident was lodged by the voter at the Manir Police Station on the same day *vide* Report No. 000280/08.

[10] In the event the petitioner claims that the respondent had directly or indirectly, by himself or by any other person on his behalf committed acts of undue influence under s. 9(1) of the Election Offences Act 1954 which constitutes corrupt practice or illegal practice under s. 32(c) of the Election Offences Act 1954.

[11] On the same fact as described, the petitioner claims that acts of general intimidation had so extensively prevailed at the N.22 Manir State Constituency that it may be reasonably supposed to have affected the result of the election thereby constituting a ground under s. 32(a) of the Election Offences Act 1954 to declare the election of the constituency void.

The 2nd Incident

[12] At about 2pm on election day 8 March 2008 a registered voter of the constituency Mustaffa bin Yusof went to the voting place at Channel 2 Sekolah Kebangsaan Teluk Menara Polling Centre, Manir for the purpose of voting. While entering the voting place and after handing over his identification card to the agent or representative of the Returning Officer, the Election Commission (3rd respondent) informed the voter that his name on the electoral list had been underlined indicating that he had already voted and was thereby prevented from voting.

[13] The petitioner alleges that the 2nd respondent as an agent or representative of the Election Commission the 3rd respondent, had failed to execute his duty in failing to provide Form 11 to the voter to enable him to vote as required under r. 14 of the Elections (Conduct of Elections) Regulations 1981 and had thereby willfully prevented a registered voter from voting contrary to s. 4(d) of the Election Offences Act 1954. The act of the 2nd respondent election officer, it is contended, constitutes a non-compliance with the provisions of a written law and thereby provides a reasonable ground for the court to declare the election result of the N.22 constituency null and void under s. 32(b) of the Election Offences Act 1954.

[14] Further the petitioner claims that the cumulative effects of the incidents described had given rise to extensive prevalence of general intimidation thereby providing further ground for the court to declare the election of the N22 constituency void under s. 32(a) of the Election Offences Act 1954.

The Conduct Of The Hearing

[15] On 25 May 2008 the petitioner withdrew his petition against the 2nd and 3rd respondents with their consent thereby leaving only the petition against the 1st respondent on the cue.

[16] On the same day the 1st respondent raised a five-point preliminary objection on the petition. Although no advanced notice was given the petitioner was nevertheless allowed to proceed with the 1st respondent being allowed to reply the next day.

The Preliminary Objection

[17] For ease of reference and clarity the objection and the reply thereto is set out verbatim in the bi-column table as follows:

(i) That the Petitioner has not complied with the requirements of Rule 4(1)(b) of the Election Petition Rules 1954 ("Rules").	1. It is submitted that this allegation is wholly without merit because the Petitioner has stated the holding and result of the election and the facts and grounds relied on to sustain the prayer.

	2. Additionally, the Petitioner will rely on the decision of the High Court in Election Petition No.: 26-01-2006-01 (SG) *Edmund Stanley Jugol Anak Benedict Sandin v. Datuk Peter Nyarok ak Entrie* where it was stated in relation to Rule 4(1)(b) of the Rules that the Rule does not require particulars be given of the result, which is what the details about the number of votes cast and the winning majority constitute. The High Court continued to state that the details sought were in effect a matter of evidence in relation to the specific question. 3. Further, it must be emphasized that Rule 5 of the Rules expressly states that evidence need not be stated in the petition but particulars may be ordered upon application. However, it must be stated that the 1st Respondent has never sought any particulars whatsoever of this Petition so it is highly improper for him to complain of any lack of particularization. 4. Further Order 18 rule 7 of the Rules of the High Court expressly states that pleadings must contain only a statement in a summary form of the material fact on which the party pleading relies for his claim but not the evidence by which those facts are to be proved.

(ii) The Petitioner has failed to properly plead his allegations under Section 32(a) and (c) of the Election Offences Act 1954 ("Act")	1. It is submitted that this submission is also devoid of merit. Firstly, Counsel for 1st Respondent has agreed that there are details (presumably particulars i.e. BUTIR-BUTIR in the Petition) but paradoxically said not enough particulars. At this juncture, one is minded of Rule 5 of the Rules which states that evidence need not be pleaded but particulars may be ordered, but the 1st Respondent has not applied so. 2. Importantly, the case of *Chiew Chiu Sing v. Datuk Celestine Ujang AK Jilan & Ors* [1997] MLJU 63 clearly spells out the difference between form and substance when it is stated "An Election Court does distinguish between form and substance, *Abdul Karim* [1969] 2 MLJ 72 and *Khoo Kay Por* [1980] 1 MLJ 92 and while Election Petition now before me may have inadequacies as to form, it is adequate as to substance read in totality. *(a) General Intimidation - was it pleaded?* 3. Counsel for the 1st Respondent also stated that the basis of the plea of general intimidation had not been pleaded. It is submitted that this contention is wholly misconceived. 4. The proof of whether general intimidation had occurred is a question of evidence. The Petitioner has pleaded the facts and particulars in support of its plea of general intimidation and the issue of whether the plea is established

	is a question to be decided based on the evidence adduced at the trial of the Petition. 5. It is wrong for the 1st Respondent to circumvent the trial process by seeking to avoid a trial by merely saying from the Bar that the plea of general intimidation will not succeed. 6. It is wrong for the 1st Respondent to say that because 10 people only beat up one man, there was no general intimidation because the incident happened at the entrance to the polling station at Sekolah Kebangsaan Teluk Menara, Manir. The effect of such violence, commotion and thuggish behavior clearly would have generally intimidated other voters intending to vote at the said polling station. The incidents at the polling station on that day was a clear attack on the democratic process as the voters were being intimidated from the exercise of their fundamental democratic right to vote. 7. There is no requirement in law which necessitates the Petitioner to name each and every witness who will support its plea of general intimidation. 8. Additionally, in cases of election petitions, it is clearly established that the onus and burden of proof is, different from normal civil actions. In *Harris Mohd Salleh v. The Returning Officer* [2001] 3 CLJ 161 it was held by Muhammad Kamil Awang that the burden of proof in election petition cases lies on both sides citing the decision

	of Lamin J (as he then was) in *Hamad bin Mat Noor v. Tengku Sri Paduka Raja* [1993] 3 MLJ 533.
	(b) Agency - failure to plead
	9. Counsel for the 1st Respondent submitted that the Petitioner had not pleaded the knowledge and consent of the candidate and therefore the pleading in respect of Section 32(c) of the Act was deficient. It is submitted that this argument is misconceived because the basis on which the Petitioner seeks to rely on Section 32(c) of the Act as the acts were carried out by the agents of the 1st Respondent.
	10. Counsel for the 1st Respondent also submitted that the Petitioner had not pleaded that the acts were committed by the election agent of the 1st Respondent under Section 14 of the Act.
	11. We respectfully submit that the contention of the 1st Respondent in respect of agency is wholly erroneous. Agency in election law is distinct from agency under the common law! This position is well established in our jurisprudence, it has an important rationale, and that it would be impossible to expect Petitioners to establish the common law agency as it would impose an unduly harsh burden of proof and would enable wrongs to be perpetrated in elections.
	12. In *Ali Amberan v. Tunku Abdullah* [1970] 2 MLJ 15, Raja Azlan Shah J (as His Highness then was) approved the definition of "agency" under the election laws in England to be as follows:

by election law the doctrine of agency is carried further than in other cases. By the ordinary law of agency, a person is not responsible for the acts of those whom he has not authorized, or even for acts done beyond the scope of the agents' authority ... But in that construction of agency were put upon acts done at elections, it would be impossible to prevent corruption accordingly a wide scope has been given to the term (See *Wakefield* case [1874] 2 O'Mal & H 102).

13. It is clear that in election law that an agent can be a person who is not even personally appointed by the candidate in question but extends to persons who are workers or supporters of the party. This is trite knowledge and applicable to both, whether you are the winning candidate or losing.

14. In *Harris Mohd Salleh v. The Returning Officer, Ismail Majin & Ors (And Another Petition)* [2001] 3 CLJ 161, the High Court also accepted the legal proposition that a candidate at an election is responsible for the act of his agents who are not and would not necessarily be agent under the common law of agency.

15. Additionally, in *Harris Mohd Salleh v. The Returning Officer, Ismail Majin & Ors (And Another Petition)* [2001] 3 CLJ 161, the High Court also held that the returned candidate is not altogether absolved from all liability to adduce evidence to disprove the case of the Petitioner, for instance, to

	prove facts within his special knowledge. In this regard as the Petitioner has identified the alleged assailants being Saidi bin Samad and Faizal bin Ali, it is then incumbent upon the 1st Respondent to come forward to state precisely what his connection with these individuals are because it is a fact within his special knowledge. This will be in addition to the evidence that the Petitioner will adduce at the trial of the Petition to establish its contention of agency.
	16. The assailants were positioned outside the polling station, they wore 'jaket lambang parti PAS' and its badges. They were behaving in an unruly and violent manner and in these circumstances, the PAS candidate cannot plead ignorance of who these people were and at the very least they should have taken steps to prevent the violence from occurring. The failure of the PAS candidate implies his tacit consent of the general intimidation at the polling centre. He also never lodged police report disclaiming knowledge and liability of the incident.
	17. This case clearly exemplifies the hijacking of the democratic process, where, by acts of intimidation, voters are frightened off from exercising their constitutional democratic right to vote by thuggery and violence. This is a situation where it would be incumbent on the 1st Respondent not to shy away from dealing with the truth of the events of the 8th of March 2008 by technicalities but to come

	forward and answer these serious allegations which go to the heart of the electoral process and democracy.
	18. It is submitted that even if a single voter is prevented from exercising his democratic and constitutional to vote by the use of terror and violence, then the whole electoral process is tainted and should be declared void. What remedy does this Court have to give to Encik Mohd Amiruddin who was beaten up at the gate of the polling station and prevented from exercising his democratic right? What will this Court do to ensure that the right of Encik Mohd Amiruddin and others who were too frightened to exercise their vote are protected? This is precisely what the Petitioner wants to highlight to this Court in this Petition.
	19. Briefly, Section 32 of the Act particularly the words "... prove to the satisfaction of the Election Judge" means none other than both parties (Petitioner and Respondents) must state their case and adduce evidence thereof to support and rebut allegations. It is not the case of Petitioner having to prove a *prima facie* case at criminal trial and upon successfully proving a *prima facie* case, and then to prove beyond reasonable doubt that the Accused is guilty. Election cases are entirely different from criminal cases.
	(c) The non-compliance has "affected" the result of the election.

	20. It is submitted that the 1st Respondent's contention that the Petitioner needs to show that the alleged acts of undue influence have "affected" the result of the election in respect of its contentions under Section 32(c) of the Act is wrong in law as there is no such requirement under the said provision. The Petitioner is not required to show that the acts of undue influence, which amount to corrupt practices, affected the result of the election under Section 32(c) of the Act. 21. It is submitted that it is the Petitioner's right to seek to prove its complaints at the end of the Petition and it is wholly improper to seek to prevent a Petition from being heard on an assumption that the allegations have not affected the result of the election. 22. The allegation in respect of the non-compliance of election laws involves a fundamental right and that is the right of a citizen to exercise his vote. This right is contained in Article 119 of the Federal Constitution and is the very essence of a democracy. 23. If an elector is wrongfully deprived of his right to vote, then the sanctity of the election process has been wholly affected and even the deprivation of a single vote means that the result in an election has been affected. 24. In *Abd Hamed b Mamat v. Uz Baharuddin* [1993] 1 AMR 1 the High Court held that:

	Sepertimana yang mahkamah ini telah katakan tadi, bahawa mahkamah ini bersependapat dengan prinsip dalam kes Morgan yang menghujahkan bahawa tidak perlu dibuktikan ketidakpatuhan itu menyentuhi keputusan pilihanraya (affect the result of the election) asalkan ternampak pada mahkamah ini bahawa ketidakpatuhan peruntukan-peruntukan undang-undang pilihanraya itu telahpun menyebabkan pilihanraya itu dijalankan bukan mengikut prinsip-prinsip yang telah diperuntukkan oleh undang-undang pilihanraya ... Justeru itu mahkamah ini berpendapat bahawa tidaklah perlu pihak pempetisyen membuktikan bahawa ketidakpatuhan itu menyentuhi keputusan pilihanraya asalkan ianya membuktikan bahawa ketidakpatuhan itu nampaknya adalah suatu ketidakpatuhan yang menunjukkan bahawa pilihanraya telah dijalankan tidak mengikut prinsip-prinsip perundangan pilihanraya. Selain dari ini mahkamah ini juga mengambilkira prinsip yang dimaktubkan oleh kes *Tg Puteri* yang menekankan bahawa sesuatu pilihanraya bukan hanya melambangkan hak warganegara-warganegara kepada pengundian bebas tetapi memerlukan penyertaan awam dalam pemilihan kerajaan yang dikehendaki mereka menerusi satu proses yang bukan sahaja menjaminkan keadilan, kerahsiaan, kesaksamaan dan keteraturan

	mutlak tetapi yang juga merangkumi keyakinan dan kepercayaan awam kepada cara bagaimana prose situ dilakukan maka kerana ini, dipercayai garis-garis panduan perundangan telah dikanunkan untuk mengaturkan tatacara bagi sesuatu pilihanraya yang saksama. Sebarang penyimpangan-penyimpangan serius daripada tatacara-tatacara itu akan menyentuhi sistem perwakilan politik yang demokratik dan bebas dan menjejaskan kepercayaan awam atas kesaksamaan dalam pilihanraya. Ditegaskan pula dalam *Ali Amberan* [1970] 2 MLJ 15 di ms 17 bahawa tujuan utama pelbagai peruntukan-peruntukan undang-undang pilihanraya ialah untuk melindungi kesucian proses pilihanraya dan mahkamah-mahkamah tidak akan, dalam keadaan-keadaan biasa memperkecilkan operasinya. Kesucian proses pilihanraya adalah perlu diutamakan.'
(iii) By virtue of the agreement between the Petitioner and the 2nd and 3rd Respondents to enable the latter to be excluded from the Petition, then it is no longer possible for the Petitioner to proceed under Section 32(b) of the Act (Paragraph C of the Petition – p 8)	1. It is submitted that as the 1st Respondent has taken the position that this part of the Petition does not concern him, then he is entitled not to submit on the same. The Petitioner however, continues to have the right to establish that the election was not carried out in accordance with the laws relating to elections and seek to have the election nullified under Section 35 of the Act.

	2. The officers of the Election Commission will be involved in the proceedings as the said commission has agreed to cooperate with providing the necessary witnesses and it was on this basis that, by consent, the Election Commission and the Returning Officer were excluded from the proceedings as parties. 3. It was made abundantly clear to the Court that such exclusion by consent did not mean that the Petitioner either had accepted the preliminary objection or was abandoning the contention of non-compliance of election laws relating to the conduct of elections – paragraph C of the Petition at page 8.
(iv) The Petitioner failed to plead the serial number in the electoral roll of the voter named Muhammad Amiruddin Mariappan bin Abdullah	1. It is submitted that there is no requirement that the serial number in the electoral roll of the voter is pleaded in the Petition. Yang Arif is urged to be minded of the case of *Chiew Chiu Sing v. Datuk Celestine Ujang AK Jilan & Ors* [1997] MLJU 63 which clearly spells out the difference between form and substance when it is stated "An Election Court does distinguish between form and substance, *Abdul Karim* [1969] 2 MLJ 72 and *Khoo Kay Por* [1980] 1 MLJ 92 and while Election Petition now before me may have inadequacies as to form, it is adequate as to substance read in totality".

	2. The Petitioner has pleaded that Muhammad Mariappan bin Abdullah is a registered voter in the constituency and the Petitioner will adduce the electoral roll at the trial through appropriate witnesses. 3. To apply to strike out the Petition at this stage is a gross abuse of the process as the 1st Respondent is seeking to circumvent the process of election petitions by raising a frivolous objection.
(v) The petitioner failed to plead whether the voter named Muhammad Amiruddin Mariappan bin Abdullah in fact had cast his vote on the polling day.	1. It is submitted that this objection is wholly misconceived as the Petitioner has pleaded a paragraph B(7)(1)(d) of the Petition that Muhammad Amiruddin Marippan Abdullah did not vote on polling day.

Ruling On The Preliminary Objection Of The 1st Respondent

The Essentials Of A Petition

[18] An election petition is essentially a unilateral complaint. Unlike an action begun by writ, there is no joinder of issues. Under r. 16 of the Election Petition Rules 1954 the petition is deemed to be at issue on the expiration of the time limited for making the petition. Upon the objection being raised the court is therefore bound to examine whether on the face of it the petition discloses a complaint that merits a hearing.

[19] A petitioner is obliged to plead in the petition itself such material facts with such particulars where necessary to show on the face of the petition that he has a cause to complain under one of the five provisions of s. 32 of the Election Offences Act 1954 before his petition can be examined on the merit at a full hearing.

[20] The petitioner cannot supplement his petition later by affidavit or otherwise for the court will not travel outside the petition in order to decide whether he has a cause of action. See *Tan Yar Joo v. Sin Yee Estate Sdn. Bhd* [1995] 2 CLJ 657 where the following passage from the judgment of Plowman J in *Re Lundie Brothers Ltd.* [1965] 2 All ER 692 at 699 C) was applied:

> Parenthetically, there is here a point which I think that I should mention. It was suggested in the course of argument that it was really the evidence not the allegations in the petition which was of importance in this matter. I entirely dissent from this proposition. It seems to me that it would be wrong for the Court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents to it have been guilty of some oppression or some lack of probity.

[21] *Re Lundie Brothers* was of course concerned with a petition in corporate law – a *fortiori* in an election petition where the rules are even more stringent. A failure on the part of the petitioner to state in the petition itself such facts as to disclose a cause of action on his complaint is therefore liable to have his petition struck out.

[22] Now r. 4(1)(b) of the Election Petition Rules 1954 requires an election to "briefly state the facts and grounds relied on to sustain the prayer." In *Patau Rubis v. Patrick Uren & Anor* [1984] 1 CLJ 51; [1984] 2 CLJ (Rep) 348, Charles Ho J in holding that r. 4(1) is mandatory equated it to s. 83 of the (Indian) Representation of the People Act 1951 despite a slight difference in wordings between the two laws. Section 83 of the Act provides that "contents of petition shall contain a concise statement of material facts on which the petitioner relies."

[23] Charles Ho J then went on to explain what is meant by "material fact" in an election petition by adopting what Ray J said in *Hardwari Lal v. Kanwal Singh* [1972] AIR Vol 59 SC at p. 520:

> Material facts are facts which if established would give the petitioner the relief asked for. If the respondent had not appeared could the Court have given a verdict in favour of the election petitioner. The answer is in the negative because the allegations in the petition did not disclose any cause of action.

[24] He then concluded that:

> The Courts in India also explained in other cases the words "material facts" to mean what is necessary for the purpose of formulating a complete cause of action and the failure to plead which would render the pleading to be struck out under the rules of pleadings. (See *Keshav Prasad v. A.D. Mani* [1961] DEC 133 (MPHC); *H.V. Kamath v. Election Tribunal* AIR [1958] MP 168).

[25] Having heard the submissions of the parties, I am convinced that only ground (i) read with ground (ii) above are of substance worthy of consideration. This is in addition to an incidental ground (not listed in the bi-column) raised by the second counsel for the 1st respondent Dato' Wan Abdul Muttalib in the course of the proceeding that any miscreant of the supervising officer in refusing to allow the voter Mustaffa bin Yusof to exercise his right to vote in the 2nd incident even if proved would not affect the result of the election under s. 32(b) of the Election Offences Act 1954.

[26] The two grounds are considered below:

Whether The Petitioner Has Pleaded Facts And Grounds Necessary To Sustain The Petition Under s. 32(c) And 32(a) Of The Election Offences Act 1954

[27] The petitioner is expected when presenting his petition to have possessed sufficient cogent evidence of the involvement of the 1st respondent to be able to set it out as "facts and grounds" in his petition. A court enquiring into the sustainability of a petition under s. 32(c) is bound to examine whether on the face of that petition there is in existence such "facts and grounds" to show:

(i) that a corrupt practice or illegal practice was committed in connection with the election;

(ii) that it was committed by the candidate or with his knowledge or consent, or by any agent of the candidate.

[28] I can accept the submission of counsel for the petitioner that with respect to (i) above the petitioner had pleaded sufficient material "facts and grounds" to show that an act of corrupt practice within the meaning of s. 9 of the Election Offences Act 1954 may have been committed. But he has failed to plead the

"facts and grounds" in (ii) above to indicate that the corrupt practice was committed by the respondent or "with his knowledge or consent, or by any agent of the candidate". A

[29] The fact that a group of ten persons had held up the voter, that from amongst them one known to the voter had worn a PAS logo, and that yet another in the group was recognized by the voter as the person who punched him, without more, is insufficient to show the culpability of the 1st respondent in the incident for this may well indicate that they were mere supporters whose acts the 1st respondent may not have any control of. B C

[30] The petitioner would be required to state with precision such acts or instances which can be attributed to the 1st respondent to indicate his culpability and which he would have to verify at the hearing of the petition. It would not be enough (as the petitioner had done in this instance) for him merely to repeat the exact words of s. 32(c) and to treat it as "facts and grounds" to satisfy the requirement that the alleged corrupt practice was "committed by the candidate or with his knowledge or consent, or by any agent of the candidate". D E

[31] Pleading such facts and grounds is not synonymous with pleading evidence as counsel for the petitioner submitted. The petitioner is not required to plead what transpired in detail. Rather he would only be required to plead facts and grounds sufficient to merit a hearing. F

[32] A failure to state in the petition such fact or facts to indicate the culpability of the candidate (the 1st respondent) means a failure on the part of the petitioner to establish a ground worthy of sustaining the petition and must be struck out. G

[33] Since the petition under s. 32(a) alleging that acts of intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election, is premised on the same facts and grounds as alleged under s. 32(c) described earlier, it must therefore suffer the same fate. H

Whether The Facts And Grounds Pleaded Can Sustain The Petition Under s. 32(B) Of The Election Offences Act 1954

[34] To succeed under this ground, the petitioner is required to prove that: I

A (i) the officer conducting the election at the Manir N.22 constituency had wrongfully failed to comply with the relevant law which gives him the right to vote; and

(ii) such non-compliance affected the result of the election.

B **[35]** The Federal Court has now ruled in *Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors* [2005] 2 CLJ 237 per Alauddin Mohd Sheriff FCJ, that in determining whether a non-compliance with the provision of any written law relating to the conduct of an election affected the result of the C election under s. 32(b), the court should not adopt the English approach in *Morgan v. Simpson* [1974] 3 All ER 722 which interpret the equivalent but dissimilar English s. 37(1) of the Representation of the People Act 1949 disjunctively to read that "the court can still declare the election void even if the D irregularities do not affect the outcome of the election". The language of s. 32(b), it was held, is crystal clear.

[36] It is significant to note that only one voter Mustaffa Yusof was alleged to have been prevented from voting in the N.22 Manir E State Constituency election and that the 1st respondent had won by a majority of 406 votes. It goes without saying that even if the said Mustaffa Yusof had been allowed to vote and had cast his vote in favour of the petitioner, the result would not have been any different.

F **[37]** Assuming that the petitioner succeeds in proving that the denial of the voter's right to vote was wrongful and can be construed as non-compliance with the written law relating to the conduct of the election under s. 32(b), to sustain the petition on G this ground the petitioner would still have to "prove to the satisfaction of the election judge" that the non- compliance affected the result of the election.

[38] I can accept the submission of counsel for the petitioner Encik Firoz Hussein that the question of whether there was non- H compliance of any written law relating to the conduct of the election is a matter of evidence to be determined at the hearing of the petition where the allegation of the voter has to be verified and the conduct or act of the officer has to be examined. But I I cannot accept his submission that the question of whether the

non-compliance of such law has affected the result of the election should also be determined at the hearing. It is plain that the difference of one vote would not have made any difference. I agree that there may be extraneous circumstances where even preventing one voter to cast his vote may affect the result of the election. If indeed the petitioner had intended to rely on such extraneous circumstances as a ground then it would be incumbent on him to plead facts to indicate such circumstances in his petition. Not a scrap of such facts is pleaded.

[39] The petition on this ground is plainly unsustainable and should be struck out.

[40] It follows that the other ground under s. 32(a) which is premised on the cumulative effect of non-compliance by the officer at the polling station in preventing the voter Mustaffa Yusof from voting and the assault on the other voter Muhammad Amiruddin, which the petitioner contends had led to extensive prevalence of general intimation will also have to fail.

[41] The entire petition is struck out with costs.